

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**Houston, Texas**

**LEVY PREMIUM FOODSERVICE, L.L.C.<sup>1</sup>**

**Employer**

**and**

**Case No. 16-RC-10542**

**SERVICE EMPLOYEES INTERNATIONAL UNION,  
AFL-CIO, LOCAL 100**

**Petitioner**

**DECISION AND ORDER**

The Service Employees International Union, AFL-CIO, Local 100, hereinafter referred to as the Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all vendors employed by Levy Premium Foodservice, L.L.C., hereinafter referred to as the Employer, at the Toyota Center. At the time of the petition, about 38 employees were classified as vendors. The Employer contends that the petitioned-for unit is not appropriate and that the only appropriate unit is one that includes all food service employees at the Toyota Center. A hearing officer of the Board held a hearing and the parties filed briefs with me.

Although a wall-to-wall unit, as sought after by the Employer, may be appropriate for purposes of collective bargaining, there is no bargaining history for such a unit between the parties at the Toyota

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<sup>1</sup> The Employer's name appears as amended at the hearing.

Center, no labor organization seeks to represent such a unit, and the appropriateness of an overall unit does not establish the inappropriateness of a smaller unit. Nonetheless, based on the record evidence, I conclude that the petitioned-for unit is inappropriate because it does not share a separate and distinct community of interest.<sup>2</sup>

### **STATEMENT OF FACTS**

The Employer is a Texas corporation engaged in the provision of food service in various venues. The Employer is a subsidiary of Levy Restaurants. On October 6, 2003, the Employer hosted its first operational function at the Toyota Center and since then has provided food service for other events. The Employer's food service operations entail preparing and providing food and beverage throughout the entire arena. As part of its food service operations, the Employer employs about 400 employees.

In preparation for providing food services, in September 2003, the Employer advertised for applicants to fill all of the food service positions and conducted several job fairs. All applicants applying for the food service positions used the same application process. Applicants filled out the same application, and after they identified their area of interest, the applicants interviewed with that area's manager. All applicants were made a conditional offer of employment, contingent on passing a drug test. All employees were then required to sign a consent form for the drug test.

The employees were required to attend an Employer-provided orientation. The orientation was not segmented based on job classifications. During the orientation, the Employer welcomed employees, discussed the Employer's expectations, and informed employees of the Employer's purpose, which was to "take care of [the] guests" by providing food and beverage. The orientation also included a video

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<sup>2</sup> In view of the unit determination made herein, it is not necessary to resolve any supervisory issues raised by the parties.

presentation, OSHA and sexual harassment training, and an introduction to the Employer's policy and procedures. The Employer provided each employee with a workbook that was utilized during the training. The workbook summarized the orientation and contained the employee handbook. In addition to this training, cashiers with limited or no experience were offered rudimentary cash register training. The Employer also provided training for all employees to obtain licenses to sell alcoholic beverage.

The Employer offers all eligible employees, irrespective of classification, the same benefit package, which includes vacation, sick leave, a savings plan, a flexible spending account program, and a health and dental insurance plan. Upon satisfying certain eligibility requirements (working a certain amount of hours in a given period), any employee may participate in the health benefits. It is the employee's responsibility to notify the Employer if he/she believes the eligibility requirements have been met and he/she desires to participate. The Employer may verify an employee's hours worked by the records it maintains of all hours worked for each employee. All employees are required to sign in and out to record their hours of work. Employees' hours vary depending on the job classifications:

<b>Job Classification</b>	<b>Working Hours</b>
Hosts and Cocktailers	5:00 p.m. - 9:30 p.m. or 10:00 p.m.
Bartenders and Barbacks	4:00 p.m. - 11:00 p.m.
Servers and Assistant servers	5:00 p.m. - 10:00 p.m.
Attendants	5:00 p.m. - 10:00 p.m. or 10:30 p.m.
Runners	5:00 p.m. - 10:00 p.m.
Stand leads and assistant stand leads	2:00 p.m. - 10:00 p.m. or 11:00 p.m.
Cashiers	4:00 p.m. - 10:00 p.m. or 11:00 p.m.
Vendors	5:00 p.m. - 9:30 p.m.
Set-ups	9:00 a.m. - 3:00 p.m. or 4:00 p.m.
Warehousemen	days and also during events

The Employer compensates employees in one of three ways: commission plus tips, hourly plus tips, and hourly. If employees on commission do not earn a commission that exceeds the minimum wage rate, \$5.15 per hour, they are compensated at the minimum wage rate. The record revealed that the Employer has not had to pay employees on commission at the minimum wage rate because their commissions have exceeded the minimum wage rate.

The Employer provides full or limited food and beverage service in the suites and the restaurant, to designated seating areas in the arena, for banquets and catering, and at general concession stands, portables and bars. John Cruise is the director of operations and he was responsible for initially setting up the operations at the Toyota Center and is now responsible for running the operations. The parties stipulated, and I find, that John Cruise is a supervisor within the meaning of Section 2(11) of the Act because he has the authority to effectively recommend discharge. The Employer also employs a human resources director and controller. The record establishes that the human resources director and controller report directly to John Cruise.

The Employer's operations are divided into five departments: concession, suites, warehouse operations, restaurant, and banquet and catering. Each department has a culinary portion and a service portion. All of the culinary portions of each department are staffed with chefs, cooks, and dishwashers, under the supervision of Executive Chef Eddie Romero.<sup>3</sup> The staff in the culinary portion works mainly in the kitchen areas. The Employer has two types of kitchens. In the main kitchen the employees prepare food for a variety of different areas at the arena. In the other kitchens, the employees perform

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<sup>3</sup> The record does not contain a stipulation regarding the supervisory status of the executive chef and is devoid of evidence to make such a finding. Due to the unit determination made herein, it is not necessary to determine the supervisory status of this position.

finish work and do some cooking. Some kitchens share an open space with the fixed concessions and the vending rooms. These kitchens are located on one side of the open area, the vending room is located on the adjacent side of the kitchen area, and the fixed concession stand is located at the front of the open area. Employees must walk by the vending area to get to the kitchen area. Cashiers working at the fixed concession stand must walk through the vending area to get to their work site.

The service portion of each department is collectively managed by John Cruise and a group of managers: Jack Jensen, director of concessions; Brad Turner, senior concession manager; Anthony Lopez, senior concession manager; and Sander Stotland, manager for hiring and scheduling. Chris Curran, general manager of the clubs, is also a part of the management team. The record showed that the service portion of the suites department is under the supervision of Joe Guthrie,<sup>4</sup> general manager of the suites. The parties stipulated, and I find, that Jack Jensen, Brad Turner, Anthony Lopez, Sander Stotland, and Chris Curran are supervisors within the meaning of Section 2(11) of the Act because they have the authority to effectively recommend discharge.

The warehouse department is under the supervision of Andrew McDonnell, director of purchasing, and Joseph Williams, supervisor. The parties stipulated, and I find, that Andrew McDonnell and Joseph Williams are supervisors within the meaning of Section 2(11) of the Act because they have the authority to effectively recommend discharge.

Below the managers are four zone supervisors: Yvette Johnson-Hill, club concessions; Mancini Millhouse and Carrie Rogers, concession stands; and Pam Spychalski, vending room. The record

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<sup>4</sup> The record does not contain a stipulation regarding the supervisory status of the general manager of the suites and is devoid of evidence to make such a finding. Due to the unit determination made herein, it is not necessary to determine the supervisory status of this position.

revealed that none of these individuals have the authority to hire, fire, transfer, promote, lay-off, discipline, reward, adjust grievances or effectively recommend such.

The service portion of each department is staffed by employees in different classifications. The concession department has about 150 to 200 employees consisting of vendors, cashiers, stand leads, assistant stand leads, and runners. The employees work at either the fixed concession stands, the portable concession stands, or in the vending rooms. However, the record contained general testimony that several employees have work in various classifications.

The concession department employees wear red polo shirts, except the supervisors, stand leads and assistant stand leads. Those employees wear long-sleeved gray shirts. The vendors wear a white baseball type cap with the Rockets' new logo and the other employees wear a red cap. The stand leads, assistant stand leads, cashiers, and runners work in the fixed concession stands. When portables are used, cashiers staff them. If additional employees are needed to work in the portables, the vendors are hired as cashiers and are paid accordingly. Patrons come to the fixed concession and portable stands to purchase food and beverage. The vendors, designated cashier(s), and runners work in the vending area. The vendors go into certain seating areas and offer patrons food and beverage. The vending cashier issues receipts to the vendors for products supplied. The runners supply the vendors with products needed to serve the guest at the Toyota Center during events.

In the suites department, the Employer employs attendants, runners, dessert cart attendants, order-taker, and in-set servers. Their primary function is to provide food and beverages to patrons in the suites and a limited seating area<sup>5</sup> in the arena.

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<sup>5</sup> The limited seating area covers seats of patrons who have purchased one of the higher-priced tickets.

The warehouse department consists of warehousemen. They are responsible for bringing bulk product to designated areas in the arena. At times, they may assist runners with supplying product to the portable stands. The restaurant department consists of servers, hosts, server assistant, bartenders, and barbacks. The banquet and catering department consists of banquet servers, banquet bartenders, and banquet set-up.

### **ANALYSIS**

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act." **NLRB v. Action Automotive, Inc.**, 469 U.S. 490, 494-97 (1985). See **Morand Brothers Beverage Co.**, 91 NLRB 409, 418 (1950). In determining an appropriate unit, the Board examines first whether the petitioned-for unit possesses a separate community of interest. **Overnite Transportation Co.**, 331 NLRB 662, 663 (2000). The Board considers such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. **Ore-Ida Foods**, 313 NLRB 1016, 1019 (1994). It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. **American Hospital Association v. NLRB**, 499 U.S. 606, 610 (1991); **P.J. Dick Contracting, Inc.**, 290 NLRB 150, 151 (1988); **Morand Bros. Beverage Co.**, 91 NLRB 409, 419 (1950), *enfd.* on other grounds 190 F.2d 576 (7<sup>th</sup> Cir. 1951).

If the petitioned-for unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board generally attempts to select a unit that is the smallest

appropriate unit encompassing the petitioned-for employee classifications. **Overnite Transportation Co.**, 331 NLRB at 663; See **Bartlett Collins Co.**, 334 NLRB 484 (2001); and **State Farm Mutual Automobile Insurance Co.**, 163 NLRB 677 (1967).

Where the petitioner indicates a willingness to proceed to an election in any unit found appropriate, alternative units may be considered. **Acme Markets, Inc.**, 328 NLRB 1208, 1209 (1999). The parties may suggest alternative units, but the Regional Director also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. **Overnite Transportation Co.**, 331 NLRB at 663. Where both a separate unit and a more inclusive unit are appropriate, the Board bases its unit determination on the wishes of the petitioner. See **Pacemaker Mobile Homes**, 194 NLRB 742 (1971); **Mc-Hor-Han Trucking**, 166 NLRB 700 (1967). The Petitioner has stated that it does not wish to proceed to an election in any unit found appropriate other than the petitioned-for unit. Thus, the only issue that I will address is whether the petitioned-for unit is appropriate.

I find that the vendor employees do not possess a community of interest separate and distinct from other employees who may constitute an appropriate unit. All of the food service employees were hired to provide food and beverage to the patrons of the Toyota Center. The record revealed that the hiring process, benefits, and personnel policies are the same for all employees. Additionally, the service portions of each department share common supervision. The record also reflected a highly integrated operation with a substantial degree of interaction among employees in various classifications. For instance, the runner(s) and vending cashier work is highly integrated with the job duties of the vendors.



The Employer's services to the patrons are only accomplished through the coordinated efforts of the cashier, vendors, and runners.

The record did not show that the vendor employees have specialized skills and/or qualifications as compared to other employees. The record showed that the vendors attended the same Employer-provided training as other employees and utilized the same sign in/out process. The record also revealed that for an unspecified period, vendors come in contact with employees in different classifications. For example, the employees in the culinary portion of the concession department work in the same area as the vendors. The cashiers must walk through the vendors' work area to gain access to their work area. Further, the record showed that employees, including but not limited to vendors, have been employed in more than one capacity and thus there is evidence of potentially some interchange. However, the record was void of evidence pertaining to the degree of interchange between employees.

The major distinction between vendors and other classifications is the method of compensation. Vendors are the only employees paid by commission. Notably, vendors may also be paid by the hour if their sales do not exceed the minimum wage rate per hour. The distinction in compensation is offset by the highly integrated workforce, the similarity in training and job functions between employees in various classifications, and the comparable terms and conditions of employment between all employees. Notably, the Board has held that employees performing food and beverage service functions may constitute an appropriate bargaining unit if they are a definable and sufficiently distinct group apart from the other employees. **Inverrary Country Club, Inc.**, 251 NLRB 1143, 1144-1145 (1980).

Based on these factors, I conclude that the petitioned-for unit does not constitute a homogenous group of employees and is therefore an inappropriate unit. As referenced above, the Petitioner has expressed an unwillingness to proceed to an election in a unit broader than the petitioned-for unit. Consequently, I find the petition should be dismissed.

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer, Levy Premium Food Service, L.L.C., a Texas corporation, with a place of business in Houston, Texas is engaged in the provision of food service in various venues. In the 12 months beginning October 6, 2003, it will derive gross revenues in excess of \$500,000 and will receive at its Houston, Texas facility products valued in excess of \$10,000 from Ben E. Keith, an enterprise directly engaged in interstate commerce.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

### **ORDER**

**IT IS HEREBY ORDERED** that the petition filed herein be, and hereby is, dismissed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST **on December 19, 2003**. The request may **not** be filed by facsimile.

Dated: **December 5, 2003**

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/s/ Curtis A. Wells  
CURTIS A. WELLS, Regional Director  
National Labor Relations Board  
Region 16  
819 Taylor Street - Room 8A24  
Fort Worth, TX 76102

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